No. 7199

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SOCIETA ITALIANA DI MUTUA BENEFICENZA (a corporation),

Appellant,

vs.

R. A. BURR, as Trustee in Bankruptcy of the Estate of Giovanni B. Nave, Bankrupt,

Appellee.

BRIEF FOR APPELLEE.

TORREGANO & STARK,
485 California Street, San Francisco,
Attorneys for Appellee.

Filed
JAN 17 1934
PAUL P. OBRIEN,
CLERK

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Page

Statement of the case 1

Argument 2

Conclusion 9

Table of Authorities Cited

Pages

Agouree v. Plummer, 175 Cal. 543 7

Bankruptcy Act §70 (5) U. S. C. A. §110 .... 3, 4

Brown v. Crawford, 42 Am. B. R. 263, 252 Fed. 248 3

Cal. Law Review, Vol. 6, p. 156 at 157 7

Cantello Mfg. Co., In re, 26 Am. B. R. 57, 185 Fed. 206 3

Churchill v. Ackerman, 22 Wash. 227, 60 Pac. 406 6

Gilbert's Collier (2d. Ed.) p. 1160 3

Lynch v. Sprague Roller Mills, 51 Wash. 535, 99 Pac. 578 6

Martin v. Thompson, 62 Cal. 618 6

Matter of Vernon R. Hook, 11 Am. B. R. (N. S.) 470, 25 Fed. (2d) 408 5

Paige v. Fowler, 39 Cal. 412 6

Pollack v. Meyer Drug Co., 36 Am. B. R. 835-845, 233 Fed. 861 3

Record v. Lewis, 46 Cal. App. 168 6

No. 7199

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

Societa Italiana di Mutua Beneficenza (a corporation),

Appellant,

vs.

R. A. Burr, as Trustee in Bankruptcy of the Estate of Giovanni B. Nave, Bankrupt,

Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

This is an appeal from an order of the District Court confirming on review the referee's order. The referee's order required the appellant to pay to the trustee the sum of $400.00, it being the stipulated value of certain vegetables sold by the trustee at public sale in the Bankruptcy Court on January 3, 1931. The trustee took possession of the vegetables as were growing upon the land occupied by and in possession of the bankrupt at the time of the filing of the petition in bankruptcy. Also from an order of the referee in bankruptcy holding that the appel-

lant has no right, title or interest or claim in or to a certain pump and 10 H. P. motor referred to in the petition and found by the referee not to be a fixture on the land.

The facts are contained in the referee's certificate on petition to review (Rec. p. 13) and in the statement of evidence (Rec. p. 22, et seq.).

ARGUMENT.

The sole questions presented upon this appeal are:

(1) Whether or not the fact that the landlord permits his tenant to hold over from month to month following the expiration of a lease for five years, during which time a crop of vegetables is planted, cultivated, matures and is ready for harvesting, ipso facto divests that tenant of his right to the crop and thereby divests his trustee in bankruptcy of a right to the crop by a simple notice to quit for a non-payment of rent, which notice is referred to in California Code of Civil Procedure, §1161.

(2) Whether or not by such notice to quit, the title of the lessee and his right to possession thereof, is by operation of law divested in so far as it relates to pumping equipment admittedly belonging to the bankrupt and used by him in the irrigating of his crops and not constituting a fixture on the land.

The bankrupt, from April 2, 1930, until the date of his bankruptcy on November 20, 1930, was holding over with the consent of his landlord certain property under the terms of a lease providing for such holding

over, which lease had expired on April 2, 1930. Following the expiration of the lease, the landlord permitted his tenant to plant upon the land a crop of garden truck and bring same on to maturity about the time of his bankruptcy. On October 13, 1930, with the crop ready to be harvested, the landlord served upon the tenant a notice to quit for the non-payment of rent. (Rec. p. 31.) Between October 13, 1930, the date of the notice to quit, and November 20, 1930, the date of the filing of the petition in bankruptcy, nothing further whatsoever was done by the landlord relative to his asserted right to regain possession of the land.

With the filing of the petition in bankruptcy, the growing crop and all other property in possession of the bankrupt came into the possession and under the control of the Bankruptcy Court; in other words, into custodia legis.

> §70 (5) Bankruptcy Act;
> *Gilbert's Collier* (2d Ed.), p. 1160;
> *Pollack v. Meyer Drug Co.* (C. C. A. 8th Cir.), 36 Am. B. R. 835-845; 233 Fed. 861;
> *In re Cantelo Mfg. Co.* (D. C. Me.), 26 Am. B. R. 57; 185 Fed. 206;
> *Brown v. Crawford* (D. C. Ore.), 42 Am. B. R. 263; 252 Fed. 248.

The trustee when elected, by operation of law, was vested with title *as of the date of adjudication* to all property of the bankrupt which "prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him." (Bankruptcy Act §70

(5), U. S. C. C. §110.) On the date of adjudication no affirmative act other than the notice to quit had been performed by the landlord. After the date of adjudication no affirmative act could be done by the landlord tending to divest the trustee of the vested rights arising by operation of law with the adjudication. The trustee severed the crops and sold them for $400.00, and after severing and selling same delivered the land up to the landlord.

The question of what rights flowed to the landlord with the giving of his notice to quit for non-payment of rent has been squarely decided in a case almost "on all fours" with the instant case both as to law and facts. We set out as follows such portion of it as appears pertinent:

> Howard Bixler leased his farm for one year to Vernon Hook, the bankrupt. The lease contained the usual covenant for rent on a monthly basis of $85.00 and reserved a right of entry to the lessor for non-payment of rent. No rent was paid. Bixler issued a distraint warrant on July 16, 1927, the rent being four months in arrears, and on July 20th his lessee was adjudicated a voluntary bankrupt. At the time of the entry by the landlord there was an unharvested crop sown by the bankrupt on the land. This crop was sold by the trustee under order of the Court and the proceeds held by the Court for further determination relative to its ownership. The petition of the landlord asked that either the full sum of the proceeds of the sale be paid over to him or, as an alternative, his rent be paid, the rent

amounting to a sum less than the proceeds of the sale of the crop. The Court in a well reasoned decision held that the landlord was entitled to either the forfeiture of the lease or distraint of the property of the tenant on the land until the payment of the rent was made. He elected to distrain. The Court held that the trustee in bankruptcy was entitled to the proceeds of the sale of the crops and denied the landlord's petition, stating:

"The result is, therefore, that there was no valid forfeiture by the entry on July 19th, and therefore the trustee is entitled to the entire proceeds of the sale of the crops for the benefit of the creditors. * * * The bankruptcy of the tenant does not affect the lease. (Citing cases.) It still continues in force, and though the landlord is not entitled to file in bankruptcy for his rent because a claim for rent yet to accrue, being contingent, is not one which is provable under §63 of the Bankruptcy Act (citing cases). He has a perfect right to proceed to judgment in a personal action as long as the lease is in existence. Of course, it might be that his right to sue for the full amount of the rent is practically of little value, but it is to be remembered that the landlord still has the land and its productive value, and it is more equitable that he be relegated to the uncertain remedy against the tenant than that the general creditors, who have nothing to rely upon except their provable claims, be deprived of realizing on the sale of the crops."

Matter of Vernon R. Hook, Bankrupt (U. S. D. C. March 29, 1928), 11 Am. B. R. (N. S.) 470, 25 F. (2d) 408.

The rule is well settled that the occupier of the land is the owner of all crops harvested during the term of his occupancy, whether the occupant be a purchaser in possession, a tenant in possession, or a mere trespasser in possession holding adversely.

In *Paige v. Fowler,* 39 Cal. 412, the Court said:

> "No case has been cited where it has been held that the owner of the land out of possession was the owner of the crops grown and actually harvested by the person in possession, and the very fact that the owner may recover the rents and profits of the land shows that he cannot recover the crops."

In *Record v. Lewis,* 46 Cal. App. 168, it was held that the owner of the land could not recover the gross value of the crops grown thereon even by a trespasser, the owner's damages being confined to the rental value of the land, for the crops having been severed belonged to the trespasser.

In *Martin v. Thompson,* 62 Cal. 618, it was held that an action to recover possession of grain sown and harvested by the defendant while in adverse possession of the lands of the plaintiff was not maintainable.

In *Churchill v. Ackerman,* 22 Wash. 227, 60 Pac. 406, the Court said:

> "That the title to crops *follows actual possession* and not a right to possession merely, is well established; and when a person in adverse possession severs crops before recovery, the title thereto is in the person in possession."

In *Lynch v. Sprague Roller Mills*, 51 Wash. 535, Pac. 578, it was said:

> "It is an elementary rule of law that the occupier of land is the owner of all crops harvested during the term of his occupancy, *whether the occupant be a purchaser in possession, a tenant in possession, or a mere trespasser in possession holding adversely.*"

From the foregoing it may be seen that for the landlord to claim that by the mere delivery of a piece of paper to his tenant in possession he could divest the tenant and his successor in interest of all title or interest in the growing crops on the land, would do violence to elementary and well settled principles of law; and where the trustee, as he did in this case, immediately went into possession of the growing crops, severed same himself and sold them pursuant to stipulation with the landlord that same might be done, the instant case is brought squarely within the rulings cited above.

Great store is laid by appellant in the decision of *Agouree v. Plummer,* 175 Cal. 543. In addition to that case being severely criticized by the law writers (Cal. Law Review, Vol. 6, page 156 at 157), the facts in the case are not similar and revolve around a different principle of law. In that case, the landlord had recovered possession from his tenant and controversy arose over the right of the landlord to crops grown by a sub-tenant and still growing and unsevered *at the time that actual possession was recovered by the landlord.*

In the instant case, no attempt to regain actual possession by the Societe was made. They simply gave a notice to quit and sat supinely by for a period

of approximately a month until the trustee had come into possession of the land, succeeding the bankrupt's possession therein, and with appellant's permission had severed the crops and disposed of them. To permit the right to arise for which the appellant contends, would open wide the door for collusion and fraud between landlord and tenant, which is to say that the tenant, incurring large expense for the growing of a crop and creating for the growing a large indebtedness, could, on the eve of the crop coming to maturity, defeat the rights of his creditors by permitting his lease to go momentarily in default and receiving from the landlord a notice to quit, and thereby divest himself of all of the assets represented by the growing crop in favor of his landlord and to the detriment of his creditors.

In order for the right for which the appellant contends to arise in so far as his contention relates to the crops, it would have been necessary for him to have reduced the land to his actual possession prior to the severance of the crops therefrom. That this was not done is not disputed, nor is it disputed that the only thing that was done by the landlord to give rise to his contention was the simple service upon the tenant of a notice to quit. That this would convey no title to the growing crops to him by operation of law and would create no lien thereon is expressly shown by the cases above cited.

In so far as the contention of the landlord relates to the pump used for the raising of water by the tenant and admittedly belonging to him, we will not burden the Court with a citation of authorities on so fallacious

a contention as the landlord makes, which is, "in a nutshell," that by this same service of notice to quit, title to the pump was vested in him. The record discloses that the pump was not a fixture, that it was capable of removal and, as we have said previously, it might be as well contended that by the notice to quit the tenant was rendered powerless to drive his cattle from the land.

CONCLUSION.

It is respectfully submitted in view of the facts and the law as hereinabove set forth, the order of the referee and District Court should be affirmed.

Dated, San Francisco,
January 17, 1934.

Respectfully submitted,

Torregano & Stark,
Attorneys for Appellee.